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SUPREME COURT, U.S.
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No. 09-357

In The Supreme Court of the United States

BRENT SMITH,
Petitioner,

v.

KURT JONES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

John S. Pallas
Special Assistant Attorney General
Appellate Chief
Oakland County Prosecutor's Office

Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. Where a State Court has reviewed the merits of a petitioner's federal claim for plain error, is the decision of the Sixth Circuit in a habeas corpus action that there was procedural default of that claim contrary to the decisions of this Court.

II. Whether the decision of the Sixth Circuit conflicts with the decisions of other circuits that hold a state court's plain-error review of a federal claim is not a procedural default.

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JURISDICTION

Petitioner, a person in state custody, commenced this action in the United States District Court for the Eastern District of Michigan, pursuant to 28 U.S.C. § 2254, by filing a petition for writ of habeas corpus on July 29, 2005. The district court issued an opinion and order that conditionally granted the petition for writ of habeas corpus on September 25, 2007. Pet. App. 27a. Respondent filed a notice of appeal on October 9, 2007 in the district court. On April 10, 2009, a panel of the Sixth Circuit Court of Appeals reversed the district court's grant of the habeas petition in an unpublished opinion authored by Judge Cook and joined by Judge Merritt. Pet. App. 1a. Judge Cole issued a concurring opinion Pet. App. 15a. Petitioner filed a petition for rehearing and rehearing en banc. In an order dated June 26, 2009, the Sixth Circuit denied the petition for rehearing en banc as no judge of the Court requested a vote on the petition and the original panel denied the petition for rehearing. Pet. App. 65a.

Petitioner subsequently filed a petition for a writ of certiorari in this Court. This Court has requested that Respondent file a brief in opposition to the petition. This Court has jurisdiction to determine the issues raised in the petition pursuant to 28 U.S.C. § 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254 (e)(1) provides:

> In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to judgment of the State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

COUNTER STATEMENT OF THE CASE

Brent Smith, hereinafter referred to as Petitioner, was charged with three counts of criminal sexual conduct as a result of his sexual molestation of women he came into contact with during his duties as a police officer for the City of Berkley in the State of Michigan. Petitioner was convicted as charged following a jury trial before a trial judge of the Oakland County Circuit Court in the State of Michigan. The trial court sentenced Petitioner in November of 2001 to three concurrent terms of four to fifteen years' incarceration.

The Michigan Court of Appeals accurately and succinctly summarized the underlying trial facts of this case as follows:

> Defendant was a police officer with the City of Berkley from June 1997 until approximately 2001. The instant charges arose from events in the early morning hours of December 23, 2000, when defendant, who worked the midnight shift, was on duty and patrolling. The complainant, 19 year-old Shannon Sargent, testified that at around 1:30 a.m. that morning, defendant approached the vehicle in which she and her boyfriend were "making out," which was parked behind a bar in Berkley. Sargent showed defendant a driver's license that was not her own, belonging to a woman who was of legal drinking age. Sargent testified that defendant asked her to step out of the car and get in the police car,

asked if he could search her and did so, and later asked if he could do a second search while she was seated in the back seat of the patrol car, during which he felt her breast, inner thighs, vaginal area, and buttocks, while his hand was underneath her clothes. She testified she was crying and hysterical. Her boyfriend at the time, Peter Marinelli, corroborated that testimony, and said she had told him that defendant had put his finger inside her. Defendant drove Marinelli and Sargent to the local Denny's and dropped them off. The manager of Denny's testified that he saw Marinelli and Sargent and that Sargent was crying and upset. Sargent's mother and Sargent testified to the adverse effects and mental anguish the incident caused Sargent, including her seeking therapy, her subsequent inability to drive more than short distances and her fear of police officers.

The trial court permitted the prosecution to present similar acts evidence through two witnesses, Kristin Oliver and Corinne Steinbrenner, both of whom testified that defendant had inappropriately touched them during searches following traffic stops in 1998. Oliver, a 33 year old, testified defendant stopped her after she rolled through several Michigan turns, around 2:30 a.m. on May 3, 1998. She failed a field sobriety test. Defendant patted her down before placing her in the

police car and taking her to the station. At the station, defendant told her he had to search her again and put his hands inside her bra and tried to search inside her pants. He observed her go to the bathroom through a window and said he had to search her again, moving his hand up her inner thigh, cupping her vagina, and then moving down the other thigh. Oliver pleaded guilty of driving while impaired. In May 2001, she brought a federal suit against the Berkley police department arising out of the May 1998 incident.

Corrinne Steinbrenner testified that on June 21, 1998, when she was 16 years old, defendant pulled her over at around 1:30 a.m. while she was driving a friend's car, without a license. She lied to defendant about having a license. Defendant searched her, then searched her friend and sent him home in his car. After that, he searched her again, groping her chest over her clothing. Defendant took her to the police station, under arrest. Several days later, she told her mother about the incident, and the two filed a complaint against defendant at the station.

Defense counsel vigorously cross-examined and impeached both of the similar acts witnesses.

The defense's theory was that defendant committed no wrongdoing. Defendant

> adamantly denied conducting a second search of Sargent, and maintained throughout trial that his investigation and search of Sargent were "routine" and permissible in scope. Defense counsel argued that the complainant and the similar acts witnesses were not credible, that there was no system, scheme or plan on his part, and that his intent was not in issue because he denied committing the acts charged.
>
> The jury convicted defendant as charged. The trial court denied defendant's motions for new trial and for directed verdict of acquittal. [Pet. App. 68a-70a.]

Petitioner filed a direct appeal to the Michigan Court of Appeals. The Michigan Court of Appeals affirmed Petitioner's conviction in an unpublished opinion dated October 7, 2003. (Appendix 67a.) Petitioner then filed an application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court denied the application in order dated August 31, 2001.

This federal habeas action and the appeal followed.

REASONS FOR DENYING THE PETITION

Petitioner claims that the state appeals court fully considered the merits of his federal claim when it reviewed his claim of prosecutorial misconduct for plain error. As such, he asserts that the Sixth Circuit's determination that the claim has been procedurally defaulted for purposes of federal habeas review was contrary to decisions of this Court and conflicts with decisions of other federal circuits.

There is no conflict between the Sixth Circuit's decision in this case and opinions of this Court. In prior opinions, this Court has not determined that plain-error review, especially where that review includes something less than full review of the merits of the federal claim, results in the state waiving the procedural default for purposes of federal habeas review.

Further, this case does not present a good vehicle to resolve any conflicts among the federal circuits on the question of whether a State court's plain-error review that considers the underlying merits of the claim constitutes procedural default in a federal habeas corpus action. This is because, in this action, the Michigan Court of Appeals did not fully address the merits of the claims at issue. Thus, this case would not assist this Court in resolving this issue raised by Petitioner.

This Court should deny the petition.

I. Petitioner's cited authorities do not support that this Court has already concluded that plain-error review means that the State has waived the procedural default so that the federal habeas court can itself review the federal claim on its merits.

The Michigan Court of Appeals rejected Petitioner's claims of prosecutorial misconduct that occurred during closing statements to the jury because his attorney had failed to object to the cited comments. It did so by finding that no plain error had occurred that affected Petitioner's substantial rights. While the Michigan Court briefly discussed *some* of these claims, it did not fully reach the merits on others (not even discussing the substance of some of the claims), thereby clearly enforcing the procedural default rule in ultimately rejecting the claims.

Petitioner argues, citing to the district court opinion, that the Michigan appeals court "addressed each issue of prosecutorial misconduct" and concluded that "they were without merit"; and that the State appeals court thus had in fact not enforced the procedural sanction, but had reviewed the claims on their merits, which is contrary to a number of this Court's opinions. Pet. Brief, 15a. Petitioner argues that this is an appropriate case by which this Court can resolve the question of whether plain-error review constitutes a review on the merits such that a state procedural bar forecloses federal review, thereby resolving the split among the federal circuits that has arisen on this question.

There are some significant flaws in Petitioner's logic, just as there were in the federal district court's reasoning concerning the State appeals court's review of this matter. It is these flaws that prevent this case from being the vehicle by which this Court could resolve the question of whether plain-error review constitutes a review on the merits for purposes of federal habeas corpus procedural default analysis.

As this Court very recently noted in this Court in *Beard v. Kindler*,[1] federal habeas courts have limited review powers concerning issues that have been rejected by the state courts:

> A federal habeas court will not review a claim rejected by a state court "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

One of the ways that state appellate courts have addressed claims by defendants is by finding that, where the defendant fails to object at trial or otherwise preserve a claim at the trial court level, the defendant must show "plain error" to merit further consideration of his claim.

The Michigan Court of Appeals has described plain-error review in the context of review of claims

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[1] *Beard v. Kindler*, 558 U.S. ___ 2009 U.S. LEXIS 8944, *4 (2009), *slip. op.* at 1

of prosecutorial misconduct (the claims at issue here in this action) as follows:

> Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative plain error. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements. . . . . [A]nd jurors are presumed to follow their instructions[.][2]

Thus, under Michigan law, plain-error review is not just concerned with the merits of a claim. The merits may or may not be significant at all. Rather, the *impact* of that potential error – in terms of

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[2] *People v. Unger*, 749 N.W.2d 272 (Mich. 2008)(citations omitted).

prejudicial effect – not only the trial but also on how the fairness, integrity, and public integrity of judicial proceedings are viewed because of the purported error. To equate this with review on the merits is a serious misunderstanding of the concept of plain-error review.

Although Petitioner claims that this Court has already noted that "where a state court recognizes that there was no objection to an error at trial, but goes on to consider the merits of the claim pursuant to a plain-error standard of review, that review should be considered a review on the merits and not a procedural default," Petitioner's brief, p. 12, an examination of the authorities he cites for this proposition reveal that he is overstating the language of those authorities.

Petitioner cites footnote 44 of this Court's 1982 opinion in *Engle v. Isaac*.[3] That footnote in turn references two prior opinions of this Court, *Mullaney v. Wilbur*,[4] and *Ulster County Court v. Allen*.[5] These opinions do not indicate that plain-error review constitutes review on the merits. Rather, both *Engle*'s footnote 44 and the two prior opinions involve state courts *explicitly* deciding not to apply the procedural default at all.

As to *Engle*, the footnote indicates that "[i]f Ohio had exercised its discretion to consider respondents' claim, then their initial default would

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[3] *Engle v. Isaac*, 456 U.S. 107, 135 (1982).
[4] *Mullaney v. Wilbur*, 421 U.S. 684, 688 n. 7 (1975).
[5] *Ulster County Court, New York v. Allen*, 442 U.S. 140, 147-154 (1979).

no longer block federal review."[6] A review of the remaining portion of the footnote, as well as the authorities cited further defines the point. Where a State court has the option to enforce a procedural default – and does not do so – there is no procedural default.

In *Mullaney*, this Court noted that "Respondent did not object to the relevant instructions at trial. The Maine Supreme Judicial Court nevertheless found the issue cognizable on appeal because it had "constitutional implications"[7] In *Ulster County*, this Court noted that the New York state courts had not relied on a state procedural ground in rejecting the prisoner's constitutional claim not only because of the probable non-existence of such grounds in New York law, but also because the trial court explicitly ruled that there had been no procedural default and ruled on the merits of the claim (in a post-conviction motion to set aside the verdict). In this way, the state court of appeals adopted the judgment and reasoning of the trial court in rejecting the prisoner's claim on appeal.[8]

In short, Petitioner has not shown that the Sixth Circuit's opinion in this case conflicts with opinions of this Court. This Court has not determined that plain-error review results in the State waiving the procedural default for purposes of federal habeas review.

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[6] *Engle*, 456 U.S. at 135 n. 44.
[7] *Mullaney*, 421 U.S. at 688 n. 7.
[8] *Ulster County Court*, 442 U.S. at 152-155.

II. This habeas action is not the proper vehicle to resolve any possible conflict between the federal circuits concerning the application of plain-error review and its effect on procedural default on federal habeas review.

As to Petitioner's next point, the State of Michigan acknowledges that at least one circuit has previously determined that the application of a plain-error standard that encompasses a merits review does not constitute a procedural bar to federal review.[9] In *Walker v. Endell*, the Ninth Circuit concluded that the state court, in applying the plain-error standard, had conducted a review on the merits which effectively lifted the state's procedural bar to review.[10] The Sixth Circuit has repeatedly held that plain-error review does not constitute a waiver of state procedural rules.[11] Other circuits have similarly held that plain-error review does not waive procedural default.[12]

Without examining the question about whether this represents a true conflict, as a threshold matter, this case does not clearly present

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[9] *See Walker v. Endell*, 850 F.2d 470, 474 (9th Cir. 1987).

[10] *Walker*, 850 F.2d at 475.

[11] See *Scott v. Mitchell*, 209 F.3d 854, 865 (6th Cir. 2000); *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006).

[12] The Seventh Circuit has stated that a court's "review for plain-error does not cure a procedural default." *Rodriguez v. McAdory*, 318 F.3d 733, 735-736 (7th Cir. 2003). The First Circuit has concluded that consideration of a "miscarriage of justice" exception by a state court in reviewing a procedurally defaulted claim does not operate as a waiver of the procedural bar. *See e.g., Lynch v Ficco*, 488 F.3d 35, 45 (1st Cir. 2006), cert. denied 127 S.Ct. 198, 166 L.Ed.2d 161 (2006).

the question because: (1) in this case the Michigan Court of Appeals' decision only addressed a sub-set of the prosecutorial misconduct claims in a way that could arguably be considered a merit review occurring within a plain-error application; and (2) Michigan's plain-error review is clearly different than a merits review.

The Michigan Court of Appeals stated that all the claims of prosecutorial misconduct were being reviewed for plain error and that "[r]eversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings." Pet. App. 85a. This is a much higher standard for reversal than for claims that have been preserved for appellate review. The analysis by the Michigan Court of Appeals in this regard was different than a review on the merits – it was in fact a review as to whether Petitioner was innocent or whether the purported error would have some serious effect on the judicial system – not just whether Petitioner was entitled to a new trial or was raising a meritorious claim. The Michigan Court of Appeals' analysis of the claims in this case reflects this heightened standard.

Contrary to Petitioner's claim, the State appeals court did not address each claim of prosecutorial misconduct and conclude that they were "without merit." Rather, the State court opinion in this action is a "mixed bag" – a case that only provides this Court with a few claims out of many that could even be considered "review on the merits."

In its introductory paragraph to its discussion of the prosecutorial misconduct claims, the Michigan Court of Appeals started as follows: "We find no *reversible* error." Pet. App. 84a (emphasis added). This is a different statement than to say "We find no error," where a full examination of the merits is implied. The reason such language was used by the Michigan Court of Appeals in this action was because it was applying the plain-error standard of review to all the claims of misconduct since defense counsel had failed to raise a contemporaneous objection, which is an established procedural default under Michigan law recognized by the Sixth Circuit.[13] In so doing, the Michigan Court of Appeals only conducted a cursory examination of the merits of some of the claims while not even reaching the merits at all in others.

First, several of the claims were not addressed by the Michigan Court of Appeals at all except to say that an instruction could have cured any error. In response to a question to a police officer by the prosecutor as to whether a particular pat down by an officer would be considered a sexual crime, the officer responded "Absolutely," and the trial court admonished the jury. Pet. App. 87-88a. The Michigan Court of Appeals never addressed the merits of the claim, but rather just stated that the curative instruction given to the jury would have cured any prejudicial effect.

With regard to other prosecutorial statements, the Michigan Court of Appeals made no rulings concerning the merits of the prosecutor's statements,

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[13] *See Willis v. Smith*, 351 F.3d 741, 744 (6th Cir. 2003).

but simply indicated that they were in response to what defense counsel had stated and that any prejudicial effect could have been cured "by an appropriate instruction." Pet. App. 85a-86a.

As to the prosecutor's remark in her closing rebuttal argument about not going after a person who is not guilty, the Michigan Court of Appeals did not comment on the validity of such a comment but simply stated: "[W]e conclude that a timely objection and resulting instruction could have cured any prejudicial effect." Pet. App. 85a.

A number of the claims are grouped together and were not reviewed on the merits:

> The remaining remarks defendant challenges were unobjected to and would not warrant reversal, *including* the prosecutor's references to the complainant and similar acts witnesses having cried on the stand (which was supported by the record). [Pet. App. 88a (emphasis added).]

Second, as to the remaining claims of prosecutorial misconduct, there was not a full examination of the merits of those claims. Rather, there was only plain-error review. As this Court noted in its opinion in *Stewart v. Smith*, "if a state court's decision rested *primarily* on a ruling on the merits . . . , its decision would not be independent of federal law." [14] This analysis suggests that something less than full review on the merits as part

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[14] *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (emphasis added).

of plain-error analysis may still be viewed as a procedural default barring federal review unless excused through a showing of cause and prejudice.

Regarding the comment the prosecutor made at the end of her rebuttal argument that the Michigan Court of Appeals found to be "improper" appeals to civic duty or that she sympathized with the victim, the analysis was truncated. After noting that the comments were improper, the Michigan Court of Appeals merely stated: "We conclude, however, that any prejudicial effect could have been cured by an appropriate instruction . . . and we are satisfied that the jury did not convict based on the improper argument." Pet. App. 87a.

At one point, the Michigan Court of Appeals did reject the claim that the prosecutor had improperly commented on the Petitioner's right to remain silent, which indicates an analysis on the merits. Pet. App. 86a. But this statement must be considered in the context in which all of Petitioner's claims of prosecutorial misconduct were being reviewed.

In short, this case does not give rise to the claim that Petitioner seeks to address – whether a State court that employs a full merits analysis in conjunction with its plain-error review subjects its decision to review on the merits by the federal courts in habeas corpus or whether the State court's application of the plain-error standard is the enforcement of the State procedural default. The Michigan Court of Appeals did not proceed to *fully* review the claim on the merits. There is one or two instances where there were cursory merits review

following an assertion of a default. Nonetheless, this case does not clearly present the claim that Petitioner seeks to advance in his petition for certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

John S. Pallas
Special Assistant Attorney General
Appellate Chief
Oakland County Prosecutor's Office

Attorneys for Respondent

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